

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

289

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

746

*United States Court of Appeals
For the
District of Columbia Circuit*

No. 13,832

FILED JUN 12 1957

Joseph W. Stewart
CLERK

QUEEN VICTORIA EDWARDS, et al,
Appellants

v.

LYNNIE R. SMITH,
Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HERMAN MILLER
421 4th Street, N. W.
Washington, D. C.
Attorney for Appellants

(i)

STATEMENT OF QUESTIONS PRESENTED

The question presented by this appeal is whether during the course of the trial when the parties enter into a written stipulation, authorized to be filed by the Trial Judge, and filed in the case settling their differences, can the Trial Judge thereafter ignore said written stipulations and refuse to enforce the same upon application by one of the parties who has alleged that the other party refused to comply therewith, and which claim is not denied, but to the contrary dismiss the action.

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UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

No. 13,832

QUEEN VICTORIA EDWARDS, et al
Appellants,
v.
LYNNIE R. SMITH,
Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

The appellee herein filed a complaint to substitute trustees under the deed of trust secured on real estate located in the District of Columbia, naming the trustees thereon and the owner of the property who executed the note. The owner of the property filed her counter-claim claiming fraud and misrepresentation in the inducement of her contract with the appellee whereunder the appellee sold to the appellant a building and a rooming house business conducted therein.

The complaint was filed under the provisions of Title 45, Section 614 to 619 inclusive of the Code of Laws for the District of Columbia, 1951 Ed.

This Court has jurisdiction of this appeal under Title 28, U.S. Code, Sections 1291 and 1292.

STATEMENT OF FACTS

By her amended complaint, the appellant requested the Court to remove the appellants Gant and Paroni as trustees under a deed of trust executed by the appellant Edwards on February 28, 1950, secured on Lot 814 Square 2856 located in the District of Columbia, which deed of trust was recorded among the Land Records in said District in Liber 9174 folio 170, claiming a default in the payment of the note and that the trustees refused to carry out their duties as trustees (App. 1 to 3).

The trustees by their answer stated that the maker of the note informed them that the appellee had misrepresented important matters of fact as a reason for refusing to make payment, and for that reason the trustees were unable to act but requested the Court to instruct them as to what they should do.

The appellant Edwards, who was the owner of the real estate, answered, stating she advised the trustees of the many misrepresentations of fact which induced her to buy the property from the appellee. She claimed that the appellee had installed certain remodelling and construction to the property and converted it to an apartment house, and in the sale represented the property had been lawfully remodeled and constructed as an apartment house building, and based upon this fact, the appellant paid a price commensurate with value as an apartment house building.

After the consummation of the sale the appellant took possession and when she made application for apartment house licenses the governmental authorities upon making inspection informed her that the said remodeling and construction installations made by the appellee failed to comply with the Building, Plumbing and Electrical Regulations of the District of Columbia; that all of the work was installed without any permit, although such permits were required; that such failure to disclose this information known by the appellee was a misrepresentation for which the appellant rescinded the contract, and offered to return the property. She requested cancellation of the deed of trust and note executed by her and \$10,000.00 damages for compensation for the monies which the appellant paid, plus \$10,000.00 as punitive damages, all of which was contained in her counter-claim. (App. 3 to 7). The appellee's answer to the counter-claim denied the claims of the appellant Edwards. (App. 7 to 10).

The case came on to be heard on May 12, 1955, and at the trial the parties entered into a written stipulation, which was signed by the appellee and her attorney and also by the appellants and their attorney, and filed in the case, which, in effect, provided for the return of the property to the appellee; the assumption by the appellee of a certain existing third trust which would become the second trust after the appellee had released her then existing second trust on the property; and the appellee was to give a new third trust on the property to the appellant, the combined amounts of which second and third trust was not to exceed \$3,000.00; and the appellee Smith was to pay the appellant Edwards \$600.00 in cash. That the said transaction was to be settled at the Title Company, and thereupon the counter-claim would be dismissed. Said stipulation was filed in the action and was endorsed by Judge McGuire, permitting the same to be filed. (App. 12).

Thereafter a motion was filed by appellant Edwards to require the appellee to consummate the stipulation of settlement, which alleged that said appellee refused to consummate. (App. 13, 14).

Upon the hearing of said motion, to which objections were filed, the Court denied the application, holding that the stipulation entered into and filed was unenforceable, in that it was a private agreement between the parties. This order was entered February 6, 1956. (App. 15, 16).

Thereafter application was made by the appellant Edwards and the Court permitted her to file an amendment to the counter-claim stating that a stipulation had been entered into which the appellee refused to consummate, and she requested the Court to require such consummation. (App. 14, 16).

Thereafter the cause came on to be heard in Court and on February 11, 1957, the Court, on hearing, dismissed the cause over the objection of the appellant. (App. 18, 19). Thereupon an appeal was noted. (App. 19).

STATEMENT OF POINTS

1. The Court erred in over-ruling the appellant Edward's motion to require the appellee to perform the stipulation of settlement and further erred in holding that the same was a private agreement unenforceable by the Court.

2. That the Court erred in dismissing the amended counter-claim of the appellant, in effect denying the appellant the effect of the stipulations made and executed in open Court, signed by the parties and endorsed by the Court.

SUMMARY OF ARGUMENT

The Court was incorrect in expressly holding that it had no jurisdiction to enforce the settlement agreement between the parties which was signed by the parties, filed in open Court and permitted to be filed by Judge McGuire. Furthermore the Court was wrong in holding that the same was merely a private agreement, in the light of the adjudication of this question by this Court on previous occasions.

ARGUMENT

The Court erred in holding that the stipulation on May 12, 1956, was a private agreement unenforceable. This stipulation was as a result of the case being called and signed by the parties and their counsel, and the Court endorsed the same, permitting it to be filed, thereby finally and fully settling the case and all the controversies therein, and it was the obligation of the appellee to perform it.

When the appellee failed to perform the appellant then moved the Court to require consummation of the stipulation and it was at this point that Judge McLaughlin refused to enforce it. It was directly contrary to the case decided by this Court. The case of Johnson, Inc. v. 2500 Wisconsin Avenue, Inc. 98 U. S. App. D. C. 8, 231 F. 2d. 761, wherein this Court stated as follows:

"Appellees contend, as Judge McGuire concluded, that under the circumstances in this case, the agreement to arbitrate became a stipulation. In its brief, 'appellant concedes that if a stipulation is filed in a Court proceeding, it becomes a rule of Court. Hernandez v. Siciliano, 1953, 93 U. S. App. D. C. 122, 208 F. 2d. 33; Smith v. Whittier, 1892, 95 Cal., 279, 30 P. 529.' But, appellant contends that the agreement could not be a rule of Court or a 'stipulation' in the Court proceedings until it was filed therein. We do not doubt that the respective parties have taken into account the language of Mr. Justice Brandeis in Red Cross Line v. Atlantic Fruit Company, supra, at pages 121-122,

'And, although there is no Federal legislation on the subject, an executory agreement, however comprehensive, will, if made a rule of Court, be enforced in Courts of the United States by any appropriate process. Heckers v. Fowler, 2 Wall., 123."

The same situation that prevailed in this case prevailed in Hernandez v. Siciliano, 93 U.S. App. D.C. 122, 208 F. 2d 33, which was an action by an administrator for rescission of a deed which the defendant had allegedly obtained by fraud. In that case the lower Court directed consummation of the settlement situation by which the defendants were to pay certain sums and retain the realty, and entered judgment for the amount thereof when the defendants refused to make payment, and on appeal held the stipulation settlement to be binding between the parties and that the defendant could not avoid it on the ground of absence of alleged indispensable party. (In our present case the appellee has failed to give any excuse or reason why the settlement agreement was not carried out).

CONCLUSION

In view of the clearness of the law settled here, and in view of the fact that the parties reduced their stipulation to writing, and in view of the further fact that Judge McGuire directed that the stipulation be filed, and no excuse whatsoever was offered by the appellee as to why she did not consummate the settlement agreement, Judge McLaughlin and Judge Holtzoff erred in denying the appellant's written motion and dismissing the case, respectively, and we urge the Court to reverse the judgment of the lower Court.

Respectfully submitted,

HERMAN MILLER

421 4th Street, N. W.
Washington, D. C.

Attorney for Appellants

(i)
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JOINT APPENDIXIN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

1 [Filed February 6, 1953]

LYNNIE R. SMITH
320 T Street, N. W.
Washington, D. C.

Plaintiff

v.

J. T. GANT, Trustee,
927 New York Ave., N. W.
Washington, D. C.FRANK PARONI, Trustee,
1413 Eye Street, N. W.
Washington, D. C.

and

QUEEN VICTORIA EDWARDS,
1327 10th Street, N. W.
Washington, D. C.

Defendants

CIVIL ACTION

No. 3754-52

AMENDED COMPLAINT FOR REMOVAL OF AND
SUBSTITUTION OF TRUSTEE UNDER
DEED OF TRUST

The complaint of plaintiff for removal of and substitution of trustee under a deed of trust shows unto the Court as follows:

(1) The jurisdiction of the Court is based upon its general powers to pass upon matters affecting title to real estate, Sections 614 to 619 of Title 45, D. C. Code.

(2) The plaintiff is a citizen of the United States and a resident of the District of Columbia and brings this action as payee of a promissory note secured by a second deed of trust.

(3) The defendants are adult citizens of the United States and are believed to be residents of the District of Columbia; the defendants J. T. Gant and Frank Paroni are sued as trustees under the hereinafter described deed of trust, while the defendant Queen Victoria Edwards is sued as the maker of said deed of trust and the owner of the real estate hereinafter described.

(4) Heretofore, to-wit: February 28th, 1950, Queen Victoria Edwards executed a certain second deed of trust note to the order of Lennie R. Smith, plaintiff herein, in the full sum of Six Thousand Dollars (\$6,000.00) bearing interest at the rate of five percentum per annum, said principal and interest being payable in monthly installments of Sixty-five Dollars (\$65.00) until paid.

(5) To secure the payment of said note the said Queen Victoria Edwards executed to the defendants J. T. Gant and Frank Paroni, as trustees, a second deed of trust dated February 28th, 1950, secured upon Lot 59 and part of Lot 11 (814) in Square 2856 in the District of Columbia, and recorded among the land records of said District in Liber 9174 at folio 170.

(6) The maker of the note, Queen Victoria Edwards, complied with the terms of said deed of trust and paid the installments due under said note until March 3, 1952, and since that time has fallen in default in the payments thereof, so that said note, as of this date, has interest paid to July 28, 1952, and an unpaid balance on said note of \$4,975.26, representing a period of about six months and nearly nine months for defaults in payments on principal.

(7) Plaintiff then requested the trustees to foreclose upon said property according to the terms of the said deed of trust which action J. T. Gant, Trustee under said deed of trust, refused to do and has continually refused to do to this date.

(8) The action of J. T. Gant, Trustee, in refusing to act has caused this plaintiff severe loss, has caused her to lose income from

the property so secured, has shown that he has in mind only the interests of the maker of said note and not the cestui que trust, and that if his neglect of duty and misconduct continue plaintiff will suffer irreparable harm.

3 WHEREFORE, the premises considered, plaintiff prays:

(1) That she be allowed to file this amended complaint joining the said Queen Victoria Edwards as a codefendant.

(2) That J. T. Gant, trustee, be removed as one of the trustees hereunder by virtue of his neglect of duty and refusal to act on behalf of said cestui que trust.

(3) That a suitable person be named to succeed the said J. T. Gant, trustee, by this Honorable Court.

(4) For such other and further relief as to the Court may seem just and proper.

TOOMEY & TOOMEY

By: /s/ Vincent L. Toomey
Attorneys for Plaintiff

* * *

I Consent to the filing of this
Amended Complaint:

/s/ Herman Miller,
Attorney for defendant, J. T. Gant

4 [Filed March 23, 1953]

ANSWER AND COUNTER-CLAIM OF THE
DEFENDANT QUEEN VICTORIA EDWARDS

For an answer by the defendant, Queen Victoria Edwards to the plaintiff's amended complaint, this defendant states as follows:

(1), (2), (3), (4), (5). This defendant is willing to admit paragraph One, to Five inclusive.

(6) This defendant denies that she is in default in the payments of said note by reason of the matters, facts recited hereafter.

(7) This defendant is willing to admit paragraph number 7, but states that she has advised the trustees named in the deed of trust of the many misrepresentations of fact to the damage to this defendant and notified the trustees hereof and that they had no right to foreclose by reason thereof.

(8) This defendant denies paragraph number 8.

(9) This defendant states that the plaintiff purchased the premises involved herein approximately ten (10) years ago. She is informed, and therefore avers that at the time thereof the property consisted of a one-family house.

This defendant says that the plaintiff, as this defendant is informed, installed certain remodelling, and construction, and by reason thereof, the same was converted to an apartment house.

That the said plaintiff sold the said premises to the defendant and represented the same to be a proper and a lawfully constructed apartment and based thereon this defendant paid a price commensurate with an apartment house building.

The defendant took possession of said premises, she then continued the operation of said building as such apartment.

That thereafter when this defendant made application for an apartment house license, and after inspections were made, she was informed that the plumbing, the electrical work and the other construction was installed in violation of the building and plumbing and electrical regulations of the District of Columbia; that said installations were made without permit, that the basement of the premises which were used as apartments, had been condemned.

5 That certain plumbing work was required in the yard and in the sewer. That all of said matters constituted a fraud upon this defendant, which fraud was well known to the plaintiff at the time of said sale and not disclosed by the plaintiff. This defendant, after having learned of said fraud of the plaintiff requested either damages or rescision of her contract, which the plaintiff has refused.

By reason of the fraud and misrepresentation of the plaintiff this defendant says that the plaintiff has no right to request the foreclosure of said premises. By reason of the said facts aforesaid the trustees have refused to act until the matter can be adjusted.

WHEREFORE, the premises considered, this defendant prays the plaintiff's amended complaint be dismissed.

COUNTER-CLAIM

For a counter-claim by this defendant, for rescission, or in the alternative, for damages for fraud and misrepresentation, this defendant states as follows:

(1) The jurisdiction of the Court is based upon a claim involving title to real estate, and the amount claimed herein exceeds \$3,000.00 and therefore is within the exclusive jurisdiction of this Court.

(2) This defendant adopts by reference paragraphs Two, and Three of the amended complaint.

(3) Heretofore, to wit: March, 1950, the defendant contracted to purchase the premises from the plaintiff, as a going apartment house for the sum of \$15,000.00, of which sum this defendant paid \$1,000.00 and assumed the existing first trust on said property of \$8,000.00, and executed a second deed of trust to the plaintiff herein as recited in paragraph 4 of the amended complaint, and further to secure the payment of said note, executed the second deed of trust as recited in paragraph 5 of the complaint.

(4) The defendants state that among the provisions of the written contract of purchase the plaintiff agreed that any violations of a Municipal orders or requirements issued or noted by any department of the District of Columbia would be complied with by the plaintiff at the time of settlement.

(5) This defendant says that it was understood by all of the parties, and the plaintiff well knew that the defendant was purchasing from said plaintiff an apartment house which was duly licensed and

complied with all the regulations of the District of Columbia. This defendant ~~states~~ that at the time of the contract the plaintiff knew that she had installed certain plumbing and electrical work and other work

6 without first securing a permit and that the same was in violation of the regulations of the District of Columbia; the plaintiff knew at the time of said contract that the basement of said premises was condemned for housing accommodations; and also that the premises were in need of repairs in connection with the sewer and that two of the sinks installed in said premises required vent pipes and drain pipes; and that said premises violated the fire and other building regulations of the District of Columbia;

(6) This defendant says that at the time of the contract the District of Columbia, and its various departments, had served orders of violation of the building and apartment house codes upon the plaintiff.

(7) This defendant says that although the plaintiff was in possession of all of the aforesaid facts and well knew that the same were of vital interest to the defendant, failed to disclose said information and withheld the same in order that the defendant would consummate the contract. The defendant, relying on the plaintiff's representation that the premises were fit and proper to be operated as an apartment house, as she then observed, concluded her contract with the plaintiff.

(8) This defendant further says that the plaintiff well knew that the concealment of the above information from her by the plaintiff was for the purpose of inducing the defendant to complete said contract. And all of which amounted to a fraud upon this defendant.

WHEREFORE, the premises considered, the plaintiff prays (1) that the contract for her purchase of the premises, the deed to her and the deed of trust and note be cancelled because of the plaintiff's fraud, (2) that in such event that an accounting be had between the parties insofar as the monies paid to the plaintiff, the reasonable use of occupancy of the premises and the improvements made by the defendants to the property by reason of the plaintiff's failure to disclose

the defects that then existed. (3). That in the alternative that a judgment be given against the plaintiff in favor of the defendant in the sum of \$10,000.00 for the plaintiff's wilful, wanton, reckless and careless conduct on the plaintiff's part made with the sole purpose of inducing the defendant to act to her damage. (4). That the judgment in the sum of \$10,000.00 be awarded to the defendant for actual and compensatory damages against the plaintiff because of the plaintiff's fraud, and misrepresentation, as aforesaid. (5). And for general relief.

7

/s/ Herman Miller
 Attorney for Defendant Edwards
 * * *

[Certificate of Mailing]

8

[Filed June 4, 1953]

**ANSWER OF THE PLAINTIFF LYNNE R. SMITH
 TO COUNTERCLAIM OF THE DEFENDANT
 QUEEN VICTORIA EDWARDS**

For answer to the counterclaim filed by the defendant Queen Victoria Edwards against the plaintiff Lynne R. Smith, this plaintiff states as follows:

(1) This plaintiff admits the allegations contained in Paragraphs 1 and 2 of said counterclaim.

(2) This plaintiff avers that she did in the month of March, 1950, sell said premises 1233 Girard Street, N. W., Washington, D. C., for the sum of \$15,000 payable \$1,000 in cash, the assumption of an \$8,000 deed of trust and the balance payable to this plaintiff by virtue of a second deed of trust note in the original sum of \$6,000 payable in monthly installments of \$65.00 each, including principal and interest. This plaintiff most emphatically denies that this property and real estate was sold as a going apartment house, or as an apartment house

of any purpose, but was sold as a rooming house, the conditions attendant to which were obvious to any person inspecting said premises and, particularly were the circumstances known to the co-defendant J. T. Gant, trustee, through whom this plaintiff had originally purchased said property, the said J. T. Gant having acted as a real estate agent and broker at the time of said original purchase, sometime about 1942.

9 (3) The plaintiff acknowledges that the contract of purchase might have contained reference to municipal orders or requirements which at the time of the sale might be pending against said property and her reason for not being definite in this response is that after the sale had been completed the co-defendant J. T. Gant, Trustee, requested that this plaintiff bring to him all papers in connection with this property, which she did, and the said co-defendant J. T. Gant, Trustee, has over and over again declined to return these papers to plaintiff and that, therefore, plaintiff is without definite knowledge to answer as to any provision for violation of municipal orders. This plaintiff does most emphatically state, however, that there were no pending orders for repairs ordered by the District of Columbia or any other legally constituted authority for her to make any repairs to these premises at the time she sold the same. That the property was sold as a licensed rooming house and that in order to obtain such license the premises were subjected to inspection and such permit, under the rules of the office, would be withheld until there was compliance in removing any defects. That the license year for rooming houses is October of each and every year, as to the application therefor, with inspection thereon following for the next several months, so that the examination of the premises by the District of Columbia authorities must have taken place sometime between October of 1949 and March of 1950 when the property was sold.

(4) This plaintiff denies most emphatically the several allegations contained in Paragraph 5, that the defendant was purchasing

said property from the plaintiff as an apartment house, as already recited above, and she further denies that any plumbing or electrical work, or any other character of constructive work on said premises had been carried on by her without a permit or permits and she avers that any plumbing or electrical work done by her upon said premises was done by registered plumbers and duly licensed electricians. That she also employed a general contractor to supervise and carry on said

10 work, which said contractor frequently sublet said work but only to duly licensed contractors and mechanics; plaintiff also denies that the basement of said premises was condemned for housing accommodations and she avers that said basement was only used for cellar purposes at the time she sold the property and said basement or cellar contained the usual appurtenances thereto, such as oil burner and furnace, fuel oil tank, stationery washtubs, trash containers, interior lines and ropes for drying of laundry, as well as one toilet boxed off from the rest of the area; plaintiff also denies premises were in need of repairs in connection with the sewer and that two sinks installed in said premises required vent pipes and drain pipes and plaintiff further denies that said premises violated the fire and other regulations of the District of Columbia.

(5) The plaintiff denies the allegations contained in Paragraph 6 of the counterclaim, that at the time the contract was entered into the District of Columbia and its various departments had served plaintiff with orders of violations of the building and apartment house codes and she avers that said premises were sold as a rooming house only and that there were no pending complaints by the District of Columbia, or any of its agencies, pending at the time the contract was entered into, as well as the time when the sale was consummated.

(6) This plaintiff, in answer to Paragraph 7, most emphatically denies that she was in possession of the facts averred in the counterclaim concerning notices of defects in the plumbing, etc., with reference to the maintenance of an apartment house and she avers, as heretofore stated, that said premises were sold as a rooming house which

possessed a license therefor issued by the competent department for the District of Columbia and that she did not withhold or conceal any information relating to the maintenance of said rooming house and further, as heretofore stated, that she did not contract to sell said premises as an apartment house.

11 (7) The plaintiff again denies concealment of any facts or circumstances relating to the physical conditions of this real estate and states that she exercised no effort whatsoever to induce the defendant Queen Victoria Edwards to complete said contract and that, therefore, this plaintiff cannot be guilty of any fraud or concealment. That the defendant Queen Victoria Edwards made numerous inspections of said premises before she signed the original contract of sale; that she conferred on several occasions with the plaintiff's manager for said property and she was given the freedom on many occasions to examine the premises and all the appurtenances relating thereto.

(8) This plaintiff avers that she would never have sold this property had it not been for the urgings and persistence efforts of the co-defendant J. T. Gant, Trustee, to sell the property and that said co-defendant J. T. Gant, Trustee, had endeavored on several occasions to influence this plaintiff and thereby urge her to purchase an apartment house on the corner of 14th & Girard Streets, N. W., by selling or trading the premises herein involved, 1233 Girard Street, N. W., as well as two other pieces of property owned by the plaintiff numbered, respectively, 1314 Kenyon Street, N.W. and 4817 Meade Street, N. E., Washington, D. C.

WHEREFORE, having fully answered said counterclaim, this plaintiff prays:

(1) That she be dismissed hence with her reasonable costs.

TOOMEY & TOOMEY

By: /s/ Vincent L. Toomey

* * *

Attorneys for Plaintiff,
Lynnie R. Smith

[Certificate of Mailing]

12 [Filed June 23, 1953]

PRETRIAL STATEMENT OF PLAINTIFF

Plaintiff prays for removal of and substitution of Trustee Gant, said defendant Gant being one of two trustees under second deed of trust. Defendant Queen Victoria Edwards has failed to make payments on the note drawn in conjunction with said trust since March 3, 1952 and on numerous occasions Trustee Gant has been ordered to foreclose and in each instance has refused to do so. Plaintiff therefore prays his removal and substitution.

In reply to counter claim of defendant Edwards, plaintiff states premises were sold as a rooming house and not as an apartment house; that at the time of the sale of the premises by plaintiff to defendant Edwards there were no pending orders for repair by the District of Columbia; plaintiff further avers that any plumbing or electrical work done by her upon said premises was done by registered plumbers and duly licensed electricians; that she had not been served by the District of Columbia with any notices of violations of any codes whatsoever at the time of the signing of the contract or when the sale was consummated, and that she did not conceal any fact or circumstance relating to the physical condition of these premises from defendant Edwards.

/s/ John J. Toomey
Of counsel for plaintiff

13 Smith v. Gant et al.

Defendant Queen Victoria Edwards denies that she is in default because of the fraud and misrepresentation of the plaintiff.

Defendant Queen Victoria Edwards counterclaims that the terms of the stipulation between the parties of May 12, 1955 be carried out.

15 [Filed May 12, 1955]

STIPULATION

The above cause is to be dismissed under the following conditions:

Queen Victoria Edwards is to convey the real estate involved to Linnie R. Smith.

Linnie R. Smith is to assume an existing first trust which is to be current. An existing third trust in an approximate figure of \$2334.00 representing the holdings of two note holders, payable at the rate of \$40.00 per month on the combined notes including interest is to be assumed by the said Linnie R. Smith and a new third trust is to be given by the said Linnie R. Smith, the combined amounts of these two (2) trusts is not to exceed \$3000.00; and the said Linnie R. Smith is to pay \$600.00 to Queen Victoria Edwards or her attorney at the time of closing of this transaction.

Title is to be ordered at the District Title Company with all adjustments to be made as of date of settlement.

Linnie R. Smith will release her existing second trust so that the existing third trust will become a second trust.

This instrument also is to be taken as a dismissal of the counter-claim of Queen Victoria Edwards and a satisfaction of any claim made in her behalf and Linnie R. Smith in turn releases the defendants from any claims in this connection heretofore made by her.

All settlement charges to be paid by Linnie R. Smith.

/s/ George E. Hayes
Attorney for Plaintiff

/s/ Herman Miller
Attorney for Defendants

APPROVED:

/s/ John T. Gant

/s/ Queen Victoria Edwards

/s/ Linnie R. Smith

16 [Filed November 4, 1955]

**MOTION TO REQUIRE PLAINTIFF TO CONSUMMATE
STIPULATION OF SETTLEMENT**

Comes now the defendants, by their attorney, and move the Court to require the plaintiff to complete and consummate the stipulation of settlement filed herein on May 12, 1955, and as reasons therefor states as follows:

1. The above entitled case came on to be heard before Judge McLaughlin, and during the course of the trial the parties entered into a stipulation for settlement, a copy of which is contained in the Exhibit attached hereto, made part hereof, and to which reference is made, and which is titled Final Judgment.

2. That although the parties had fully and finally entered into such stipulation of settlement the plaintiff failed and refused to consummate such settlement and agreement and by reason thereof her then attorney, John J. Toomey, withdrew from the case, and thereupon the plaintiff obtained the services of Mr. George E. C. Hayes.

3. That thereafter the parties entered into a further stipulation of settlement filed herein on May 12, 1955 and pursuant to the terms of provisions of said agreement the parties met at the District, Lawyers & Washington Title Insurance Company and memorandums of settlement was prepared and the defendant deposited the deed to the property herein for delivery to the plaintiff and thereupon the plaintiff agreed to return the following day with the cash required also to make settlement.

4. The settlement was made on October 24, 1955 and the plaintiff promised and agreed to return and make compliance therewith on the following day, October 25, 1955. But up to the time of the filing hereof the plaintiff has failed to comply with the terms of said settlement agreement and failed to deposit the necessary funds required of her and the
(defendant)

17 plaintiff is informed that the plaintiff now refuses again to comply with the second settlement agreement and has now attempted negotiating the services of an additional attorney.

5. That after the parties met at the Title Company the plaintiff visited the property and notified all the tenants residing therein not to pay any sums to the defendant, Edwards, that she is the owner of the property, and by reason of such instructions all of the persons occupying the premises have refused to make any payments, and the property is now in jeopardy insofar as the collection of rents is concerned. In addition thereto because the existing deed of trust held by the Perpetual Building Association was at least six months in default.

6. The defendants request the Court to pass an order herein requiring the plaintiff to comply with and make the settlement as agreed upon and was attempted to be carried out at the District Title Company.

/s/ Herman Miller

* * *

Attorney for Defendants

[Certificate of Mailing]

18

[Filed February 2, 1956]

**MOTION FOR LEAVE TO AMEND COUNTERCLAIM OF
THE DEFENDANT QUEEN VICTORIA EDWARDS**

Comes now the defendant Queen Victoria Edwards, and moves the Court for a leave to amend her counterclaim filed herein and as reasons therefor states as follows:

That this defendant desires to add as an additional claim a contract and settlement agreement entered into between the parties on May 12, 1955, and which is filed herein, which agreement was entered into after the case was pre-tried. That the settlement provision entered

into freely, in the presence of counsel for the parties, and because the plaintiff has failed to carry out, the defendant has been greatly prejudiced by the delay in this case.

In addition thereto, the claim upon which the amendment is requested arose after the pleadings were closed in this case.

For such other and further reasons as will be presented to the Court upon the hearing of this motion.

/s/ Herman Miller

* * *

Attorney for Defendant
Queen Victoria Edwards.

[Certificate of Mailing]

19 [Filed February 6, 1956]

**ORDER VACATING ORDER TO REQUIRE PLAINTIFF TO
CONSUMMATE STIPULATION OF SETTLEMENT AND
OVERRULING MOTION TO REQUIRE PLAINTIFF TO
CONSUMMATE STIPULATION OF SETTLEMENT**

Upon consideration of the motion filed herein by the plaintiff to vacate the order requiring the plaintiff to consummate stipulation of settlement, which order was entered herein on November 29, 1955, and upon further consideration of the defendant's motion to require the said plaintiff to consummate stipulation of settlement, it appearing to the Court that the Court had no jurisdiction to enter its Order of November 29, 1955, and that the stipulation of settlement filed herein on May 12, 1955 was a private agreement between the parties and unenforceable by the Court, it is by the Court, this 6th day of February, 1956:

ORDERED, that the plaintiff's motion to vacate the order of November 29, 1955 requiring the plaintiff to consummate settlement agreement be, and the same is hereby granted, and it is further

ORDERED: That the defendant's motion to require the plaintiff to consummate the provisions of the settlement agreement of May 12, 1955, be, and the same is hereby denied, and it is further

ORDERED: That this case be placed back on the trial calendar for immediate trial.

By the Court,

/s/ Charles F. McLaughlin
Judge

SEEN:

/s/ Leonard S. Hayes
* * *

Attorney for Plaintiff

/s/ Herman Miller
* * *

20 [Filed February 27, 1956]

**ORDER GRANTING MOTION OF QUEEN VICTORIA
EDWARDS TO AMEND COUNTERCLAIM**

Upon consideration of the motion filed herein by the defendant, Queen Victoria Edwards, to amend the counterclaim, and that the said amendment has been lodged with the Court, and upon consideration thereof, it is this 27th day of February, 1956, by the Court:

ORDERED, that said motion to amend the counterclaim, as lodged with the Clerk of this Court, be, and the same is hereby granted, and the Clerk of the Court is directed to file said amendment to the said Counterclaim.

/s/ Edward A. Tamm
Judge

[Certificate of Mailing]

21 [Filed March 6, 1956]

ANSWER TO AMENDMENT TO COUNTERCLAIM

Comes now the plaintiff, Linnie R. Smith, and for answer to the amendment to counterclaim of defendant, Queen Victoria Edwards, respectfully shows to the Court as follows:

1. She denies that the parties fully and completely settled the above entitled action as alleged in the amendment to the Counterclaim.

2. She admits that a paperwriting dated May 12, 1955 was filed herein, but denies each and every other allegation therein.

AND FOR A FURTHER DEFENSE, the plaintiff alleges that the said amendment fails to state a cause of action upon which relief can be granted the said counterclaimant.

/s/ George A. Parker

Attorney for Plaintiff

* * *

[Certificate of Mailing]

22 [Filed October 5, 1956]

PRETRIAL PROCEEDINGS

STATEMENT OF NATURE OF CASE:

Counsel for Defendant informs the court that present counsel for Plaintiff is George Arthur Parker who did not appear at pretrial session.

Counsel for Defendant will move for judgment on the pleadings and also on the private stipulation of counsel before the case proceeds to trial.

There are apparently no matters that can be stipulated and the case is ready for trial.

/s/ James R. Kirkland
PRETRIAL JUDGE

/s/ Herman Miller
Attorney for Defendant

23 [Filed February 11, 1957]

JUDGMENT DISMISSING COMPLAINT
AND COUNTER-CLAIM

This cause came on for hearing upon the Complaint, Answer, Counterclaim and Amended Counter-Claim and upon consideration of all of the testimony and evidence presented in open Court, it appearing to the Court that the plaintiff's cause of action has become moot because the real property, 1233 Girard Street, N. W., the subject of this litigation was sold at public auction on the 14th day of February, 1956, in pursuance of the provisions of a First Deed of Trust; and, it further appearing to the Court that the defendant, Queen Victoria Edwards, did not sustain the burden of proof and failed to prove her cause of action as alleged in the Counter-Claim and Amended Counter-Claim, it is therefore by the Court this 11th day of February, 1957,

ADJUDGED, ORDERED AND DECREED as follows:

1. That the Complaint, Counter-claim and the Amended Counter-claim herein be and the same are hereby dismissed with prejudice.

/s/ Alexander Holtzoff
JUDGE

[Certificate of Mailing]

24 [Filed March 12, 1957]

NOTICE OF APPEAL

Notice is hereby given this 12th day of March, 1957, that QUEEN VICTORIA EDWARDS, J. T. GANT and FRANK PARONI hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court on the 11th day of February, 1957, in favor of Linnie R. Smith, against said Queen Victoria Edwards, J. T. Gant and Frank Paroni.

/s/ Herman Miller
Attorney for Defendant
Queen Victoria Edwards

[Certificate of Service]

BRIEF FOR APPELLEE and SUPPLEMENTAL APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED SEP 10 1957

Joseph W. Stewart
CLERK

No. 13, 832

QUEEN VICTORIA EDWARDS, et al

Appellants,

v.

LYNNIE R. SMITH,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GEORGE A. PARKER

1130 - 6th Street, N. W.
Washington, D. C.

Attorney for Appellee

(i)

Appellee's Statement of Question Presented

The question is whether the Court committed an error in dismissing an amended counter-claim to enforce a stipulation entered into between plaintiff and defendant, for lack of proof, and where it appeared that the property, which was the subject matter of the suit, and stipulation had been sold at public auction under the provisions of a first deed of trust assumed by the counter-claimant.

(ii)
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UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

No. 13,832

QUEEN VICTORIA EDWARDS, et al
Appellants,

v.

LYNNIE R. SMITH,
Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE
and
SUPPLEMENTAL APPENDIX

COUNTER STATEMENT OF CASE

The appellee, plaintiff below, as payee and holder of a promissory note, secured by a second deed of trust, on property sold by the plaintiff to defendant, Queen Victoria Edwards, maker of the note and deed of trust, filed her amended complaint February 6, 1953 against the defendants below, J. T. Grant and Frank Paroni, as trustees named in the said second deed of trust. The defendant, Queen Victoria Edwards, appellant herein, was sued as maker of the promissory note and owner of the real estate described in the complaint.

The amended complaint alleged in substance that the defendant, Queen Victoria Edwards, on the 28th day of February 1950 executed a certain promissory note in the full sum of \$6,000.00, payable to the order of the plaintiff in monthly installments of sixty-five dollars (\$65.00) per month, with interest at five per centum per annum, until paid; that the payments on said note were in default since March 3, 1952 and the interest was paid to July 28, 1952. The complaint alleged that the defendants, Grant and Paroni, as trustees, under the deed of trust, had been asked to foreclose because of the default, but that defendant Grant refused. The plaintiff asked that Grant be removed and a suitable person be named by the Court to succeed him.

The defendant, Queen Victoria Edwards, (appellant) filed an answer and counter-claim.

The answer to the amended complaint denied that she was in default in her payments on the note secured by the second deed of trust and that she had advised the trustees that they had no right to foreclose because of the many misrepresentations of fact made to her by the plaintiff at the time of the sale of the property to her. The answer sets forth certain alleged misrepresentations of facts and avers that they constituted a fraud upon the defendant.

The counter-claim repeats in substance the alleged misrepresentation stated in the answer, and alleges that in March 1950 the defendant contracted to purchase the premises from the plaintiff for \$15,000; that she paid \$1,000.00 cash and assumed an existing first trust on said property of \$8,000.00 and executed a promissory note for \$6000.00 secured by a second deed of trust as recited in paragraph four of the amended complaint. The counter-claim prayed for rescission of the deed, cancellation of the second deed of trust and note, and an accounting, or that in the alternative, a judgment of \$10,000.00 for actual and compensatory damages for the alleged fraud. The answer

of the plaintiff to the counter-claim denies the allegations of misrepresentations and fraud and sets forth in considerable detail the matters and things alleged in the counter-claim.

There was a pretrial hearing of the case on June 23, 1953, J. A. 11). Thereafter on May 12, 1955, a certain stipulation (J. A. 12) was signed by the plaintiff, the defendant, and their respective counsel.

On November 4, 1955, defendant Edwards filed a motion to require plaintiff to consummate the stipulation of settlement. On November 27, 1955, an order was entered granting defendant Edwards' motion. On February 6, 1956, the Court vacated the order of November 29, 1955, which required the plaintiff to consummate the settlement agreement, denied defendant's motion to require the plaintiff to consummate the settlement agreement of May 12, 1955 and further ordered that the case be placed on the trial calendar for immediate trial. (J. A. 15-16). The case came on for hearing before Judge Holtzoff, January 31, 1957. The defendant, Queen Victoria Edwards, appellant herein, elected to stand upon her amended counter-claim, the stipulation of May 12, 1955. The plaintiff, Linnie R. Smith, appellee herein, asked that the complaint be dismissed because the property which was the subject of the suit had been sold at public auction and that the case was therefore moot. The motion to dismiss the complaint was agreed to by the defendant Edwards. The counter-claimant (appellant) then offered proof in support of her demand that plaintiff (appellee) be compelled to comply with the terms of the stipulation of May 12, 1955. After the counter-claimant (appellant) rested, and on motion of the plaintiff, the counter-claim and amended counter-claim were dismissed for lack of proof. (See certified record of official Court record hereto appended, Supplemental Appendix p. 1).

The Court entered a judgment dismissing the complaint, counter-claim and amended counter-claim February 11, 1957, from which the appellant appeals.

STATEMENT OF POINTS

1. The Court properly denied the appellant's motion to require the appellee to perform the stipulation of settlement.

2. The Court was correct in dismissing the amended counter-claim and refusing to enforce the stipulation of May 12, 1955.

SUMMARY OF ARGUMENT

The Court was correct in holding that there was insufficient proof to justify a granting of the relief demanded by the appellant and that the appellant was not entitled to the relief she demanded.

ARGUMENT

This appeal is from a Judgment entered February 11, 1957 dismissing appellant's counter-claim to enforce a stipulation.

The appellant contends that the Court erred in its order of February 6, 1956 "in holding that the stipulation of May 1956 was a private agreement unenforceable." The appellant had on November 4, 1955 filed a motion to require the appellee to consummate stipulation of settlement. This motion was granted on November 29, 1955, in the absence of counsel for the appellee and was vacated on February 6, 1956 on motion of appellee. In the order of February 6, 1956, the Court makes the statement which the appellant assigns as error. The appellant apparently takes the erroneous position that specific performance of the stipulation is an absolute matter or right. In the order of February 6, 1956, the Court ordered that the case be placed upon the calendar for immediate hearing. The case was heard on

January 31, 1957 and the appellant offered insufficient proof to justify the granting of the relief he sought on the stipulation.

The cases of Johnson, Inc. v. 2500 Wisconsin Avenue, Inc., 98 U.S. App. D.C., Hernandez v. Siciliano, 93 U.S. App. D.C., nor the other cases cited and relied upon by appellant are not in point and do not support the appellant's position.

It is conceded by the appellant that the real estate which is the subject matter of the stipulation was sold at public auction on the 14th day of February 1956. Under the circumstances, the appellant could not in good conscience ask the Court to require the appellee to perform when she (the appellant) had not perform and could not. The contention of the appellant is without merit. The order of Judge McLaughlin, vacating the order requiring the appellee to consummate stipulation, was proper and in no way prejudicial to the appellant and is not properly a part of this appeal.

In the case of Eristave Tchitcherine v. Lasser, (Circuit Court of App. - 5th Circuit) 164 F 2d 144, the District judge ordered specific performance on the pleading upon motion for summary judgment. Reversed and remanded. Circuit Judge Hutcheson, speaking for the Court, said "specific performance is not grantable as a matter of right, but only as a matter of equity, and in the exercise of a sound and informed discretion, upon a knowledge of the whole facts. Citing 49 Am. Jur. specific performance section 6-9, inclusive. Whether the case is one for specific performance must wait upon a hearing and determination as to the facts and the decision by the Chancellor upon them in the exercise of a sound and informed discretion."

Specific performance of a contract for sale of realty is a matter in which trial Court has broad discretion. Drayson v. Height, 189 F 2d 88 U.S. App. D.C. 356.

Specific performance is not granted as a matter of right, but only as a matter of equity and in exercise of a sound and informed discretion upon knowledge of the whole facts. Eristavi-Tchitcherine v. Lasser, 164 F 2d 147.

Specific performance is not a matter of right. Jamison Coal Co. v. Goltra, 143 F 2d 154 A. L. R. 1191.

Specific performance of a contract cannot be demanded as an absolute right, but rests largely within the judicial discretion, to be exercised in strict conformity with equity and justice upon consideration of all attendant circumstances. Chalmette Oil Distribution Co. v. Chalmette Petroleum Corp., 51 F. Supp. reversed - 143 F 2d 826.

And further, it is the position of the appellee that the Court was correct in dismissing appellant's amended counter-claim after the appellant had rested her case. The appellant does not challenge the correctness of Judge Holtzoff's dismissal of the amended counter-claim for lack of proof. Rather, she takes the position that her motion and demand to require the appellee to perform were grantable as a matter of right and that no testimony or evidence, except the stipulation itself, was necessary to establish her right to specific performance by the appellee.

There was a total lack of proof of performance by the appellant of the condition precedent; as for instance, the stipulation provides that "Lynnie R. Smith is to assume an existing first trust which is to be current." There was no proof that the payments were ever made current, but on the contrary it is conceded by the parties hereto that the property which was the subject of this litigation was sold at public auction, under the provisions of the first deed of trust on February 14, 1956. (Judgment dismissing Complaint and Counter-Claim, App. 18).

There was no offer of proof that the appellant was ready, able and willing to carry out her part of the contract nor was there any showing that in equity and good conscience the appellant is entitled to specific performance by the appellee.

Where performance of contract is impossible, or, if impossible, is impracticable, Court will not make a futile attempt to compel it. Villa Corp. vs. S.D. Walker, Inc., 187 F 2d 493. Merely because a contract is valid it does not necessarily follow that it should be enforced by specific performance.

In Barbour vs. Hickey, 2 App. D.C. 207 the Court said: "A party coming into equity for specific performance must show that there is equity and good conscience in support of his claim for relief * * * in view of all the circumstances of the case. The Court should either execute the contract as made by the parties or decline the exercise of its jurisdiction altogether."

In Pratt vs Carroll, 8 Cranch 471, 3 L. Ed. 627 - Specific performance was denied since equity could not relieve where it was impossible to place parties in same position and real fault was imputable to the person praying the aid of the Court.

Specific performance will be refused if a condition precedent to the duty to be enforced is not and can not be performed and is not excused, or if a condition subsequent terminating the duty has occurred.

Landon vs St. Louis Public Service Co. 48 A. L. R. 1200, 364 Mo. 1134 where it is also held that the determination of whether specific performance shall be decreed and what shall be the terms of the decree rest in the sound judicial discretion of the Court.

Where mortgages on plaintiff's land which were to have been assumed by the defendant had been foreclosed at time specific performance of contract to convey land * * * * it was held that specific performance had properly been denied. Winston vs Brown (C. A. 5th Texas) 247 - F 948. To the same effect is Gerson vs Hahn 14 N. Y. S. 2d 893.

CONCLUSION

It is respectfully contended that the Court was entirely correct in entering its judgment February 11, 1957 dismissing the complaint, counter-claim and amended counter-claim from which the appellant appealed and that its action should be affirmed.

Respectfully submitted,

GEORGE A. PARKER

1130 - 6th Street, N. W.
Washington, D. C.

Attorney for Appellee

(i)

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SUPPLEMENTAL APPENDIX FOR APPELLEE

Washington, D. C.,

January 31, 1957.

- 1 The above-entitled case came on for trial at 1:45 o'clock p. m., on Thursday, January 31, 1957, in the United States District Court for the District of Columbia, in the Court House, at Washington, D. C.

BEFORE

HONORABLE ALEXANDER HOLTZOFF, Judge of the United States District Court for the District of Columbia.

APPEARANCES:

GEORGE A. PARKER, Esquire, on behalf of the plaintiff; and HERMAN MILLER, Esquire, on behalf of the defendants.

2

PROCEEDINGS

THE DEPUTY CLERK: Smith versus Gant.

THE COURT: You may proceed.

MR. PARKER: If it please Your Honor, this case comes on the complaint of Linnie R. Smith against J. T. Gant and others.

THE COURT: I beg your pardon? Start all over again, please.

MR. PARKER: This case of Linnie R. Smith against J. T. Gant and others, Civil Action No. 3754-52, was a complaint originally filed by the plaintiff for the removal of the defendant Gant as trustee under a certain deed of trust and asked the substitution of a trustee in his stead.

The case has since that time become moot by virtue of the fact that the property which is the subject of the litigation has been sold under a first deed of trust. The suit went to the second deed of trust. The property having been sold under the first deed of trust, Mr. Gant, of course, would not be in position to serve as trustee, nor would any other substituted trustee.

THE COURT: What is the action about now?

MR. PARKER: So that I am saying to Your Honor that this matter is moot, and as far as I am concerned, on our petition, we regard it as moot.

THE COURT: In other words, you want to dismiss the case as moot?

3 MR. PARKER: As far as that part is concerned.
Now, Your Honor --

THE COURT: Is that agreeable to the defendant?

MR. MILLER: No, it is not.

THE COURT: You say as far as that part is concerned.
I do not know what you mean.

MR. PARKER: I mean as far as the substitution of a trustee is concerned, that it is moot. We have no desire to go forward on that because I think it availeth nothing, and for that reason I am perfectly willing to have my petition for the substitution of a trustee dismissed.

THE COURT: Very well.

What do you say, Mr. Miller?

MR. MILLER: I have no objection to that, Your Honor.

THE COURT: You have no objection?

MR. MILLER: Not to his petition or his complaint to substitute trustee.

However, Your Honor --

THE COURT: I will grant the motion to dismiss the petition to appoint a substituted trustee as moot.

MR. MILLER: However, Your Honor, there was a counterclaim filed by the defendant Queen Victoria Edwards, who was the owner of the property, claiming that the plaintiff in the sale of the property to her misrepresented, and she asks for rescission of the contract.

4 The case came on before Judge McGuire on May 12, 1955, and a written stipulation was entered into in which the plaintiff is obligated to pay the defendant \$3600. The plaintiff has refused to go through with that stipulation, and I am asking for judgment in accordance with the stipulation.

THE COURT: Well, what do you say about that, Mr. Parker?

MR. PARKER: Well, Your Honor --

THE COURT: Is there any proof of the fact -- have you submitted proof of the fact that the stipulation has not been complied with?

MR. MILLER: Your Honor, the proof of it is that I have filed motions in this Court asking the Court to enforce the stipulation.

THE COURT: That is not proof. A motion is not proof.

MR. MILLER: Yes, Your Honor. I can only say I have the defendant here to testify that she has not received the compensation called for in the stipulation.

THE COURT: Is the stipulation in the file?

MR. MILLER: It is signed by Judge McGuire, yes, sir. It is in the file; it is in longhand.

THE COURT: What do you say about that, Mr. Parker?

MR. PARKER: With reference to the stipulation, Your Honor, I would say that the matter of the stipulation, his right to enforce the stipulation, has been passed upon on the motion which was filed here, and on the 6th day of February, 1956, Judge McLaughlin entered an
5 order in which he vacated the prior order that had been filed requiring the enforcement of it, and in his order vacating the stipulation, Judge McLaughlin stated that the enforcement was a private agreement, and is unenforceable by the Court, and he vacated the order which had been signed previously to enforce it and held that the motion to consummate the settlement agreement of May 12, 1955, be and the same is hereby denied, and my position is that that is a matter which is res judicata, and that at this time --

THE COURT: What is the date of the order?

MR. PARKER: That is the date of February 6, 1956 -- and that Mr. Miller is barred by virtue of that order.

THE COURT: Well, Mr. Miller, does not that dispose of the matter?

MR. MILLER: No, Your Honor. There was a motion that was filed because the plaintiff refused to go through with the stipulation, a

motion was filed for judgment or an order to require her to go through with the stipulation.

Notices were sent to the attorneys for the parties, and at that time Mr. Leonard Hayes represented Miss Smith, and he didn't appear, and Judge McLaughlin entered an order to enforce the stipulation.

6 Then when he came in and represented he didn't get notice of it, all Judge McLaughlin did was to vacate his order to enforce the stipulation, but he didn't vacate the stipulation. The stipulation still remains in full force and effect.

THE COURT: Well, now, he did more than vacate the order requiring the plaintiff to consummate the settlement agreement. He did that, of course; but he did more because the order of Judge McLaughlin filed February 6, 1956, provides also: "And it is further ordered that the defendant's motion to require the plaintiff to consummate the provisions of the settlement agreement of May 12, 1955, be, and the same is hereby denied."

MR. MILLER: That is right.

THE COURT: And it is further ordered: "That this case be placed back on the trial calendar for immediate trial."

MR. MILLER: But he didn't vacate the --

THE COURT: In other words, the case stands as though the stipulation was not --

MR. MILLER: No, Your Honor. He didn't vacate the stipulation. After he vacated the order granting the motion to enforce the stipulation, then he heard the motion on the merits.

THE COURT: And he denied it.

MR. MILLER: He denied that motion, but the stipulation never was vacated.

7 THE COURT: Well, he practically held in effect that the Court will not enforce the stipulation, and I cannot enforce it because I would be overruling Judge McLaughlin.

MR. MILLER: I say that as a matter of law I am entitled to it,

with all due respect to what Judge McLaughlin did say, and I have a case, Your Honor, 2500 Wisconsin Avenue versus Johnson, which says that when a stipulation is entered and signed and filed in the case that it becomes a rule of Court.

THE COURT: Well, I think so too, but nevertheless orderly procedure requires one Judge to follow another Judge of coordinate jurisdiction so far as orders in a civil case are concerned.

Now, I consider this order binding on me. If you felt that this order was erroneous, your remedy was by appeal.

MR. MILLER: I could not appeal then because there is no judgment in the case.

THE COURT: That is correct.

MR. MILLER: He only denied my motion but it didn't dispose of the case, and I have got to stand on the stipulation.

THE COURT: I shall follow Judge McLaughlin's order. What you are trying to convince me is that Judge McLaughlin committed error.

MR. MILLER: No.

THE COURT: And I shall not hear you on that because I am not an appellate judge.

8 MR. MILLER: May I say this: That after that was done, I filed a motion for leave to file an amended counterclaim, to add to the counterclaim, and the basis or the substance of the amended counterclaim was that there was a stipulation entered into by the parties, which has not been vacated, and I am now asking for judgment in accordance with it.

THE COURT: Was that allowed?

MR. MILLER: Judge Tamm allowed my motion for the amendment, which was done after Judge McLaughlin denied the motion -- just an ex parte motion without any testimony. I am ready to go to trial on the stipulation, and I will offer that as my exhibit as a contract between the parties, and stand on it.

THE COURT: I beg your pardon? What is that?

MR. MILLER: I say when Your Honor is ready to proceed on my amended counterclaim, the procedure which I would like to adopt, if Your Honor will permit me, is to make my claim on the counterclaim by introducing the stipulation into evidence and stand on the stipulation which Judge McGuire permitted to be filed in this Court.

MR. PARKER: I would like to be heard on that point, too, Your Honor.

THE COURT: Well, of course, you have a right to go to trial, on your counterclaim.

MR. PARKER: But the counterclaim, Your Honor, is based
9 solely upon its face, based upon the alleged stipulation of May 12, 1955, and that is just my objection to his whole claim.

THE COURT: You know that I do not know on what ground Judge McLaughlin denied the motion to enforce the stipulation. Maybe he felt it should not be enforced summarily. I am not going to ask you gentlemen -- in fact, I am not going to permit what some other judge said orally because your recollection may be faulty on that, and it is not fair to the other side.

All I see is an order of the other judge denying the motion to enforce the stipulation.

MR. PARKER: But I think, Your Honor, that Judge McLaughlin plainly states in the body of the order itself why he denied it. He states it is a private agreement, and that the stipulation of settlement filed herein on May 12, 1955, was a private agreement between the parties and unenforceable by the Court, and an examination of that, which he made, will convince anybody that it is a private agreement, and one that was a private agreement, just a memorandum of an agreement, rather than an agreement.

THE COURT: Well, why is it unenforceable?

MR. PARKER: He held it was unenforceable.

THE COURT: Why? A contract is enforceable.

MR. PARKER: I know a contract is enforceable. It might be

enforceable if it is a binding contract.

10 THE COURT: Why isn't it binding? I observe this is a hand-written stipulation prepared by Mr. George Hayes and signed by him as attorney for the plaintiff.

MR. PARKER: That is right.

THE COURT: And by Mr. Miller as attorney for the defendants.

Would Mr. Hayes enter into a formal written stipulation which he expected to be unenforceable? That does not appear to me.

MR. PARKER: Well, of course, I do know that many times we enter into agreements and stipulations and so forth that we find, of course, that we cannot enforce.

THE COURT: And then it was approved and signed by the clients.

MR. PARKER: Yes; it is a memorandum of agreement.

THE COURT: Well, why isn't it binding?

MR. PARKER: Well, Your Honor, I say now that they are barred, by virtue of the fact that on the 6th day of February, 1956, the Court held that it was not binding, and I claim that that is a bar, and if he had thought that the Court was in error, he should have availed himself of the rule which requires that he appeal the ruling, and he could have appealed at that time because it was final. That goes to the very gist of his case, and he makes no contention here for any right, other than than the right which he claims under that stipulation.

11 THE COURT: I shall, of course, abide by an order of another Judge in the same case. Judge McLaughlin's order is binding on me, but I shall construe Judge McLaughlin's order in the light of reason as meaning that this stipulation cannot be enforced on motion, summarily, because it was, as he said, a private agreement between the parties. Now, I think I would have disposed of that matter, of that motion, in the same way that Judge McLaughlin did. So accepting that ruling, Mr. Miller then sued on the stipulation as a private contract, and we are ready to proceed on that.

MR. PARKER: Your Honor, may I also call your attention to the fact that before this order was entered Mr. Miller had amended his

petition based upon this stipulation, and so that the whole matter was before his Honor at that time, before Judge McLaughlin.

THE COURT: I have ruled, Mr. Parker. I have announced my ruling.

Judge Tamm has permitted Mr. Miller to amend the counter-claim so as to sue on this stipulation as a private contract or agreement.

You may proceed, Mr. Miller.

MR. MILLER: If Your Honor please, then I think I should like to be sworn.

THE COURT: What is that?

MR. MILLER: I should like to be sworn.

12 THE COURT: Well, why don't you offer the stipulation?

MR. MILLER: That is what I want to do and testify as to how the stipulation came about.

THE COURT: No; I am not going to let you do that.

MR. MILLER: Very well. Then I offer the stipulation in evidence as an exhibit.

THE COURT: I should say this: Perhaps my ruling is premature, but in order to save time, I am going to say I will exclude any testimony of any conversations that led up to the stipulation because of the parole evidence rule that prior conversations merged in the contract.

MR. MILLER: Very well. Then I offer the stipulation as Defendant Victoria Edwards' Exhibit No. 1 and rest, Your Honor.

THE COURT: Any objection?

MR. PARKER: Yes, Your Honor, I object to the admission of the stipulation upon the ground that the stipulation is unenforceable as held by Judge McLaughlin.

THE COURT: Well, that does not have anything to do with its admissibility in evidence. You are premature with that point.

MR. PARKER: And also that the stipulation shows upon its face that there were certain conditions --

THE COURT: Now, I am not going to hear that as objections to evidence. That has nothing to do with its admissibility.

13 Now, do you admit the signatures?

MR. PARKER: No, I can't, Your Honor, admit the signatures.

THE COURT: I beg your pardon?

MR. PARKER: No, I can't admit the signatures. I wasn't present at the time, and I don't know a thing about the signatures.

MR. MILLER: Then I think I will have to take the stand, Your Honor.

THE COURT: Very well. You better take the stand, although it is rather unusual for trial counsel to be a witness.

MR. MILLER: Yes, it is. Well, then, Your Honor --

THE COURT: You may proceed.

MR. MILLER: I have a witness who will testify.

THE COURT: You may proceed. I presume your testimony will be very formal.

MR. MILLER: Only to identify the signatures.

THE COURT: Very well.

Thereupon

HERMAN MILLER

was called as a witness, and being first duly sworn, was examined and testified as follows:

MR. MILLER: If it please the Court, with respect to defendant Edwards' Exhibit No. 1, which is entitled stipulation, filed on May 12,
14 1955, the instrument was signed by me personally in the presence of George E. C. Hayes. I saw Mr. George E. C. Hayes sign this paper. In fact, the entire paper is written in his handwriting.

It was also signed by John T. Gant, who I saw sign; and it was signed by Queen Victoria Edwards, who I also saw sign; and it was also signed by the plaintiff Linnie R. Smith, who I also saw sign; and I also saw Judge McGuire sign his name to the top.

THE COURT: When and where was it signed?

MR. MILLER: It was signed in the Court House in Judge McGuire's courtroom on May 12, 1955.

THE COURT: Very well.

CROSS EXAMINATION

BY MR. PARKER:

Q. Mr. Miller, you refer to Judge McGuire's signature, and is the signature that you referred to placed under the words "let this be filed"? A. Yes.

MR. PARKER: That is all.

THE COURT: Is there anything further?

MR. PARKER: No, sir.

THE COURT: Step down.

(Thereupon the witness was excused.)

THE COURT: Anything further?

15 MR. MILLER: I have nothing further, Your Honor.

THE COURT: The defendant rests?

MR. MILLER: Just one thing, Your Honor.

Mr. Gant, will you take the stand?

Thereupon

J. T. GANT

was called as a witness, and being first duly sworn, was examined and testified as follows:

THE COURT: Well, this really has become an action for specific performance of a contract, the contracting being the stipulation.

MR. MILLER: Yes, that is right.

THE COURT: And I think all the rules of law applicable to specific performance apply here.

MR. MILLER: I just merely want to show it has not been performed.

THE COURT: You may make your proof.

DIRECT EXAMINATION

BY MR. MILLER:

Q. Now, Mr. Gant, what is your full name? A. John T. Gant.

Q. What is your residence? A. 3606 Rock Creek Church Road.

Q. Mr. Gant, are you one of the defendants in this case? A.

Yes, I am.

16 Q. Now, were you present in Court on May 12, 1955? When this particular case of Smith versus Gant was called for trial? A. Yes.

Q. In Judge McGuire's courtroom? A. Yes.

Q. And did you sign the stipulation which is dated May 12, 1955?

A. Yes, I signed the stipulation.

Q. Of your personal knowledge, has that stipulation been performed since that date? A. No, it has not been.

Q. It has not been? A. No.

MR. MILLER: I have nothing further.

THE COURT: What was your last question?

MR. MILLER: Whether the stipulation had been performed.

MR. PARKER: And the answer was "no"?

MR. MILLER: And he answered "no."

THE COURT: Well, I will exclude that. That is a conclusion. But you can rest on it, if you wish.

MR. MILLER: Yes.

THE COURT: But I call your attention to the dangers of that.

MR. MILLER: Very well, I will pursue it further.

17 BY MR. MILLER:

Q. Mr. Gant, has this case been dismissed against you?

THE COURT: Well, it has just been dismissed now.

MR. MILLER: Yes.

BY MR. MILLER:

Q. Now, do you know whether or not Miss Smith, the plaintiff in this case, has acquired title to this property subject to the first deed of trust held by the Perpetual Building Association? A. I do not know that.

Q. Sir? A. I do not know that.

Q. Do you know whether or not any deed was accepted by her?

A. No, I have no knowledge of that.

Q. Do you know whether or not the third deed of trust which was on the property has been replaced by a new second trust signed by Lennie Smith? A. No, I don't know that.

Q. Do you know whether or not the title was ordered at the District Title Company? A. I don't know of my own knowledge; only by hearsay.

Q. Do you know whether or not Miss Smith has cancelled the second deed of trust held by her called for in this settlement? A. No, I don't know that.

18 MR. MILLER: I have no further questions.

CROSS EXAMINATION

BY MR. PARKER:

Q. Mr. Gant, that contract relates to property known as 1233--

THE COURT: Of course, your cross examination must be within the scope of the direct, Mr. Parker.

MR. PARKER: Yes. He was testifying with reference to -- I want him to identify the property.

THE COURT: Well, all he answered is that he doesn't know. He answered every question "I don't know." I don't recall any question that he answered in any other way.

MR. PARKER: My other question is whether or not his answers related to the property which is the subject of this litigation. That is all I wanted to know, Your Honor.

THE COURT: Mr. Parker, he answered every question "I don't know."

MR. PARKER: Very well, Your Honor. For the purpose of introducing it in the record, I am going to make him my own witness, and I want to ask just one question.

THE COURT: Don't make him your own witness now, not at this stage of the case.

You have the right to call him as your witness at the proper time.

MR. PARKER: That is all.

19 THE COURT: Step down.

(Thereupon the witness was excused.)

MR. MILLER: Miss Edwards.

THE COURT: I don't know why you call a witness who can only answer "I don't know."

MR. MILLER: I think he knows but he doesn't have personal knowledge.

THE COURT: Well, you should not waste the Court's time in calling such a witness.

MR. MILLER: I thought he did know personally.

Thereupon

QUEEN VICTORIA EDWARDS

was called as a witness, and being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MILLER:

Q. Now, what is your full name? A. My name is Queen Victoria Edwards.

Q. Is it Miss or Mrs. A. Mrs.

Q. Where do you live? A. 1727 10th Street, N. W.

Q. You are one of the defendants in this case, are you not?

A. Yes, I am.

20 Q. Now, in connection with the settlement in this case which was attempted to be made on May 12, 1955, have you received back your second deed of trust marked cancelled from Miss Smith? A. No, I haven't.

Q. Have you received the money, amounting to \$600 in cash, called for to be given to you by Miss Smith? A. No, I haven't.

Q. Have you received the second deed of trust, which is not exceeding \$3000, which is to replace the present second and third deed of trust? A. No, I haven't.

Q. Do you know whether or not Miss Smith accepted your deed? A. No, I don't.

Q. And do you know whether or not --

THE COURT: What was your answer to the last question?

THE WITNESS: Accepted my deed?

THE COURT: Speak up. What was your answer?

THE WITNESS: No, she has not accepted my deed.

THE COURT: What was the answer?

Will you read the question and answer, Mr. Reporter?

(The last question and answer was read by the reporter.)

21 MR. PARKER: Then there was further answer made by the witness, by the last answer.

THE COURT: What was that?

(The reporter read as follows:

"THE COURT: Speak up. What was your answer?

"THE WITNESS: No, she has not accepted my deed."

MR. MILLER: I have nothing further of this witness.

THE COURT: Any cross examination?

MR. PARKER: No, Your Honor.

THE COURT: Step down.

(Thereupon the witness was excused.)

MR. MILLER: Will your Honor bear with me just a moment?

May I take the stand?

THE COURT: Yes, indeed.

Thereupon

HERMAN MILLER

was recalled as a witness, and having been previously duly sworn, resumed the witness stand and testified further as follows:

MR. MILLER: If the Court please, after the stipulation was signed, I prepared the deed and the deeds of trust and sent them -- had the deed executed by Mrs. Edwards, and sent the deed to Mr. Hayes for his acceptance to complete the settlement. I tendered the deed to him but it was refused.

THE COURT: What do you mean by tendered?

MR. MILLER: By giving him the deed, delivering it to him, sending it to him, and he sent it back.

22 I have nothing further.

MR. PARKER: I have no questions.

THE COURT: Step down.

(Thereupon the witness was excused.)

MR. MILLER: That is the defendant Edwards' case, Your Honor.

MR. PARKER: I want to call Mrs. Edwards.

THE COURT: Do you have any motion, Mr. Parker?

MR. PARKER: Well, Your Honor, I want to get in the record -- Well, I think I am entitled to judgment and the case should be dismissed, the counterclaim should be dismissed, for the reason that there has not been proof of any damage whatsoever under this. There has been no proof.

THE COURT: This is a claim for specific performance. You don't have to prove damages.

MR. PARKER: He was asking for damages, and he doesn't show that there has been a proper processing of his case or, rather, with reference to the stipulation to even require performance.

THE COURT: I do not think the defendant's proof on the counterclaim is sufficient. There is no proof that the defendant was ready, able and willing to carry out her part of the contract, and the Court of Appeals has held that that is an essential feature of proof to be made in support of an action for specific performance.

23 I am going to dismiss the counterclaim for lack of proof.

MR. PARKER: I will present an order dismissing the counterclaim.

(Thereupon the trial was concluded.)